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The Distraction that Is Stand Your Ground

Katryna Santa Cruz

Florida International University (FIU) College of Law

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THE DISTRACTION THAT IS STAND YOUR GROUND

Katryna Santa Cruz*

ABSTRACT

Many critics of stand your ground law are motivated by the inaccurate belief that it gives Floridians a license to kill and a get-out-of-jail-free card before trial ever begins. This is a severe misinterpretation of Florida law. Stand your ground does not allow a person to kill anyone who makes him feel threatened, and it certainly does not grant defendants immunity from criminal prosecution based solely on their subjective fear of the victim. However, there still exists an aspect of stand your ground that is in obvious need of critical review and reform: self-defense jury instructions. This comment proposes that to function effectively and justly, Florida jurors acting as decision-makers in criminal trials must be reminded that they inadvertently operate with subconscious bias, and more importantly, that those biases have no place in the courtroom or in their verdict. Accordingly, in self-defense cases where race is at the heart of the issue, courts should refrain from using a color-blind approach—by banning discussions of race from the courtroom—and, instead, should adopt model jury instructions that explicitly prohibit race from being a part of the factual determination that the use of deadly force in self-defense was or was not reasonable.

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I. INTRODUCTION

“‘Stand your ground’ has become a get-out-of-jail-free license to kill.”¹ “[Stand your ground] is being used by vigilantes to turn themselves into judge, jury and executioner.”² “Stand your ground law[s] [sit] side-by-side with racial profiling; the ticket to vigilante justice.”³ “[Stand your ground] creates, in warped and perverse ways, numerous incentives for people in Florida to act, not only violently but lethally.”⁴ The phrase “stand your ground” has become a stamp in every modern conversation about self-defense. When George Zimmerman shot and killed Trayvon Martin in 2012, Florida’s stand your ground statute became the despised centerpiece of a national conversation about the correlation between a white shooter’s use of self-defense against a black victim and the race relations between the two.⁵ Six years after Zimmerman was acquitted on all counts, Michael Drejka shot and killed Markeis McGlockton in an act of so-called self-defense, and stand your ground has once again been thrust into a national debate about deadly force and racial prejudice.⁶

Critics of stand your ground are rightfully concerned in two major respects: (1) “weakening the punitive consequences of using [deadly] force may serve to escalate aggressive encounters” and (2) “these laws may exacerbate racial disparities in homicide where threats motivated by racial

¹ Benjamin Crump, ‘Stand Your Ground’ Has Become a Get-Out-of-Jail-Free License to Kill, USA TODAY (July 30, 2018, 9:33 PM), <https://www.usatoday.com/story/opinion/policing/spotlight/2018/07/30/stand-your-ground-florida-markeis-mcglockton-shooting-policing-usa/866902002/>.

² Andrew Gillum (@AndrewGillum), TWITTER (July 30, 2018, 11:12 AM), <https://twitter.com/AndrewGillum/status/1023994640297541633>.

³ A.B.A. TASK FORCE ON STAND YOUR GROUND LAWS, REPORT AND RECOMMENDATIONS 24 (2015), https://www.americanbar.org/content/dam/aba/images/abanews/SYG_Report_Book.pdf [hereinafter ABA REPORT AND RECOMMENDATIONS].

⁴ Edward L. Queen, *Florida’s ‘Stand Your Ground’ Law Incentivizes Violence. Markeis McGlockton’s Death Proves It*, NBC NEWS: THINK (July 25, 2018, 4:34 AM), <https://www.nbcnews.com/think/opinion/florida-s-stand-your-ground-law-incentivizes-violence-markeis-mcglockton-ncna894356>.

⁵ See Jay Livingston, *How the Zimmerman/Martin Case Hurt Race Relations in the United States*, PAC. STANDARD (July 26, 2013), <https://psmag.com/social-justice/how-the-zimmermanmartin-case-hurt-race-relations-in-the-united-states-63435>.

⁶ Michael Drejka was sentenced to twenty years in prison for manslaughter just a few days before this comment was finalized. Thus, this comment does not consider how the criticisms raised herein were (or were not) reflected in Drejka’s trial. In any case, Judge Bulone, presiding over Drejka’s trial, stated, as expected, that the “jury found that the defendant did not act reasonably responsibly[.]” See Heather Murphy, *Florida Man Sentenced to 20 Years in Deadly Parking Confrontation*, N.Y. TIMES (Oct. 10, 2019), <https://www.nytimes.com/2019/10/10/us/florida-michael-drejka-sentence.html>. Associate State Attorney Fred Schaub “called the 20-year sentence ‘appropriate[.]’” and “never thought Stand Your Ground truly applied in this case[.]” *Id.*

stereotypes produce unnecessary fatalities.”⁷ These criticisms are warranted and undisputed by this comment.

However, many other critics of stand your ground—particularly those that protested in the wake of the *Zimmerman* verdict—inaccurately believe that stand your ground gives Floridians a license to kill and a get-out-of-jail-free card at the end of trial.⁸ This is a severe misinterpretation of Florida law.⁹ Stand your ground does not allow a person to kill *anyone* who makes him feel threatened, and it certainly does not grant defendants immunity from criminal prosecution based solely on their subjective fear of the victim. While tragedies happen (and will always happen) even under a good set of long and well-established rules, the discussion below demonstrates the foundation of reason that historically underlies stand your ground. Further, the various exceptions to the retreat rule demonstrate the insignificance of the role of the affirmative duty to retreat in the face of deadly confrontations.

Nevertheless, there still exists an aspect of stand your ground that is in obvious need of critical review and reform. A mountain of empirical evidence has revealed,¹⁰ unsurprisingly, “that jurors, particularly white jurors considering African Americans and other nonwhites [as defendants or victims], bring to their roles [as jurors] unconscious mental associations that may prejudice deliberations.”¹¹ In fact, one study determined that “race was the **most significant** factor that determined whether a self-defense incident would be labeled as justified.”¹² Even more alarming, “[a] larger national study found that in cases where whites killed blacks, the killing was 281 percent more likely to be labeled as justified.”¹³ In Florida, therefore, it is imperative that courts begin to engage in the habit of “[r]eminding decisionmakers of their personal beliefs, [in order to] help them to resist falling unconsciously into the discrimination habit.”¹⁴

7 David K. Humphreys et al., *Evaluating the Impact of Florida’s “Stand Your Ground” Self-Defense Law on Homicide and Suicide by Firearm: An Interrupted Time Series Study*, 177 JAMA INTERNAL MED. 45, 45 (2017); see generally A.B.A., ADOPTED RESOLUTION 112, https://www.americanbar.org/content/dam/aba/images/abanews/2015mm_hodres/112.pdf (proposing to all legislative bodies and governmental agencies to refrain from enacting stand your ground laws and to repeal any existing ones).

8 Cynthia V. Ward, “*Stand Your Ground*” and *Self-Defense*, 42 AM. J. CRIM. L. 89, 111 (2015).

9 *Id.* at 107 (“Why then, is Stand Your Ground so controversial at the moment? . . . [C]onfusion about the elements of self-defense law generally, and about the role and function of Retreat and Stand Your Ground rules in particular.”).

10 See discussion *infra* Section III.

11 Robert M. Entman & Kimberly A. Gross, *Race to Judgment: Stereotyping Media and Criminal Defendants*, 71 L. & CONTEMP. PROBS. 93, 130 (2008).

12 ABA REPORT AND RECOMMENDATIONS, *supra* note 3, at 2 n.4 (emphasis added).

13 *Id.*

14 Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV. 733, 759–60 (1995).

Although cases such as *State v. Zimmerman* (and now, *State v. Drejka*) highlight the need for change, the true issue with stand your ground is not in the right to defend one's self, nor is it in the absence of a duty to retreat; the true issue lies in courtroom procedure. The objective reasonableness standard is the crack through which justice falls. Of all the factors that a juror may take into consideration when determining whether a defendant's use of deadly force in self-defense was reasonable, race should not be one of them. "Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law."¹⁵ This comment proposes that in order to function effectively and justly, Florida jurors must be reminded that they inadvertently operate with subconscious bias, and more importantly, that those biases have no place in the courtroom or in their verdict. Accordingly, in self-defense cases where race is at the heart of the issue, courts should refrain from using a color-blind approach—by banning discussions of race from the courtroom—and, instead, should adopt model jury instructions that explicitly prohibit race from being a part of the factual determination of whether deadly force in self-defense was reasonable.

Section II of this comment will provide a background of self-defense law, generally. This section first draws on the various similarities between retreat and stand your ground laws, and then discusses both facets of stand your ground: substantive and procedural. By explaining the rationale underlying each facet, noting their respective criticisms, and then responding to those criticisms, this section will lead to the conclusion that stand your ground need not be overhauled. Substantively, stand your ground is founded on the desire to achieve clarity and fairness in the law and it achieves just that.

Section III of this comment addresses the color-blind approach to self-defense trials. In an effort to reduce bias in cases at which race is a core issue or to avoid overly sensationalized case themes that appeal to the public eye, courts often ban references to race during trial. This is a grave mistake. Rather than reduce racial bias, such subtle, under-the-rug references to race serve to magnify jurors' subconscious racial bias. This section combines a multitude of psychosocial research which reveals that (a) color-blind trials lead to tainted verdicts and (b) subconscious bias is pervasive in everyday interactions between white and black persons—suggesting that such bias is not abandoned outside the courthouse doors. This section also uses *People v. Goetz* and *State v. Zimmerman*, two of the most controversial self-defense cases in American history, to better understand the failure of the color-blind approach.

Section IV will conclude by recommending that the Supreme Court of Florida adopt new jury instructions that explicitly prohibit the use of race as

¹⁵ *Carter v. Kentucky*, 450 U.S. 288, 302 (1981).

a physical characteristic (of either the defendant or the victim) in determining whether a defendant's fear of the victim was reasonable. The subconscious racial biases that jurors inadvertently operate with leak into our criminal justice system and decay its aspirations of blind evenhandedness. Courts must stop ignoring the obvious truth about unintentional bias and acknowledge this problem head-on. Thus, the Court's duty is to adopt jury instructions that forbid jurors from contemplating a defendant or victim's race as a factor that plays into the reasonableness determination because to fail to do so would be to actively endorse racial prejudice. For every time a court turns a blind eye in cases at which race is at the heart of the issue between the defendant and the victim, our justice system takes a step backwards in our progress towards racial equality.

This comment in no way attempts to soften the blow of stand your ground on race relations; the frequency with which white-on-black crime occurs is abhorrent and the amendment that places the burden of proof on the State at the pre-trial immunity hearing has placed an undeniable hurdle before the fairness that the criminal justice system aims for. However, a complete overhaul of stand your ground will not achieve the peace that the community seeks.

II. BACKGROUND

Pervasive misinterpretation of stand your ground has led to mass amounts of misguided public critique. By far, the biggest misconception of stand your ground is that defendants have a right to use deadly force only when they experience a *subjective* fear of their attacker.¹⁶ Other flawed criticisms attack the alleged ease with which the burden of proof at the pre-

¹⁶ See, e.g., Anonymous, *Stand Your Ground Laws Are Bad for Society*, GOSPEL POL., <http://www.gospelpolitics.com/stand-your-ground-laws-are-bad-for-society.html> ("Before [stand your ground], if the other guy blinked and you felt threatened by that, you would have had to step back away from him—now, you can just waste him. Legally.") (last visited Apr. 6, 2019); Karl Etters, *Protesters Press for Changes in Stand Your Ground Law*, USA TODAY (Mar. 10, 2014, 1:16 PM), <https://www.usatoday.com/story/news/nation/2014/03/10/stand-your-ground-protesters/6257543/> ("It's a flawed law because you don't need an actual threat . . . [a]ll you've got to do is believe a threat and you can use deadly force."); Chris Persaud, *Gun Murders Remain Higher 13 Years After Stand Your Ground—Especially in White Suburbs*, FLA. BULLDOG (Nov. 15, 2018), <https://www.floridabulldog.org/2018/11/gun-murders-remain-high-13-years-after-stand-your-ground-especially-in-white-suburbs/> ("Florida's 'Stand Your Ground' law effectively allows someone to kill an attacker as long as he can show he feared that he would be killed."); Queen, *supra* note 4 ("Instead, the Florida statute now operates using the premise that an individual need only *feel* threatened to exercise deadly force. The bar for this claim remains low, requiring little adjudication or investigation."); Allie Raffa, *Fatal Shooting Reignites 'Stand Your Ground' Law Debate in Florida*, FOX NEWS (Aug. 21, 2018), <https://www.foxnews.com/us/fatal-shooting-reignites-stand-your-ground-law-debate-in-florida> ("I think that you can have a self-defense statute—that's great, but when everywhere becomes my castle—my castle is in the middle of a parking lot at Walmart or over a handicapped spot or over in the mall . . . you see the slippery slope that's starting to occur?").

trial immunity hearing prevents any possibility of justice.¹⁷ These arguments do not have a foundation in actual self-defense law.

To lay out the premise of the recommendation that this comment proposes, this section highlights the many similarities between stand your ground and retreat statutes. With an understanding of the few differences between the two, critics of stand your ground will, hopefully, refocus their efforts on mending Florida's flawed model jury instructions.

A. *The Law of Self-Defense*

There are two approaches to self-defense statutes: retreat and no retreat—i.e., stand your ground. The minority of states that have adopted the retreat approach require a defendant to retreat from a confrontation before using deadly force. If a defendant in a retreat jurisdiction uses deadly force without first attempting to retreat, he may not claim self-defense.¹⁸ The majority of states that have adopted stand your ground statutes do not require a defendant to retreat before using deadly force. A defendant in a stand your ground jurisdiction may still claim self-defense even if he could have safely retreated from the confrontation before using deadly force but failed to do so.¹⁹

Despite their most obvious difference, both approaches to self-defense statutes arise out of the same essential elements: in order to have a self-defense claim when a defendant has used deadly force against their alleged attacker, the defendant must (1) face a threat of death or serious bodily injury (2) which is imminent (3) and which the defendant honestly (subjectively) and (4) reasonably (objectively) believes renders necessary the use of deadly

¹⁷ See, e.g., David Love, 'Stand Your Ground' Laws Encourage Racially Charged Violence, CNN (Aug. 3, 2018, 10:01 PM), <https://www.cnn.com/2018/08/03/opinions/stand-your-ground-law-racial-violence-opinion-love/index.html> ("[The 2017 Amendment] made it even easier for defendants to get off by shifting the burden of proof to the state. In other words, the state must prove that the shooter was not acting in self-defense."); The Editorial Board, 'Stand Your Ground' Could Get Worse, N.Y. TIMES (Mar. 9, 2017), <https://www.nytimes.com/2017/03/09/opinion/stand-your-ground-could-get-worse.html> ("Under the proposed change, prosecutors would essentially have to try a case twice, at a hearing and then at the trial[.]").

¹⁸ See, e.g., CONN. GEN. STAT. § 53a-19(b) (2019) ("[A] person is not justified in using deadly physical force upon another person if he or she knows that he or she can avoid the necessity of using such force with complete safety (1) by retreating."); N.J. REV. STAT. § 2C:3-4(b)(2) (2018) ("The use of deadly force is not justifiable [if] (b) The actor knows that he can avoid the necessity of using such force with complete safety by retreating[.]"); MODEL PENAL CODE § 3.04(2)(b)(ii) ("The use of deadly force is not justifiable . . . if . . . the actor knows that he can avoid the necessity of using such force with complete safety by retreating[.]").

¹⁹ As of 2014, 33 states have stand your ground laws: Alabama, Alaska, Arizona, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Montana, Nevada, New Hampshire, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin. ABA REPORT AND RECOMMENDATIONS, *supra* note 3, at 10 n.7.

force in order to prevent such injury or death.²⁰ Moreover, traditional self-defense doctrine in both jurisdictions includes a proportionality requirement (the defendant may use only that amount of force which is not excessive in relation to the threatened force).²¹

Beyond these basic elements, both approaches also embrace other common judicial and statutory corollaries. For example, both approaches are unavailable to a defendant who was the initial aggressor.²² However, the initial aggressor in either jurisdiction may possibly avail himself of self-defense immunity because both jurisdictions justify deadly force used by the person who acted first, but later “[purged] himself of that status and [regained] the right of self-defense,”²³ such as when the victim escalates the conflict. Both approaches embrace the “castle doctrine,” under which there is no duty to retreat when a defendant is attacked in his or her own home.²⁴ Moreover, both jurisdictions allow a defendant to use deadly force against an attacker who is committing a serious felony upon their person or property (as opposed to limiting the use of deadly force in the case of imminent death or serious bodily injury).²⁵

Finally, and most importantly, both approaches embrace the objective reasonableness standard for determining whether the defendant’s belief that he needed to use deadly force was justified: Was the defendant’s belief that the attacker was about to kill or seriously injure him reasonable? If so, deadly force may be used—in either jurisdiction. It should be noted that the answer to this question may not be based entirely on an objective reality (without noting how that *particular* defendant felt), nor may it be based entirely on the defendant’s subjective impressions (by *only* considering how that particular defendant felt)—it is more appropriately defined as a hybrid test.²⁶

The objective standard does not require the jury to ignore the
defendant’s perceptions in determining

²⁰ See Ward, *supra* note 8, at 93–94.

²¹ Stillwagon v. City of Del., 274 F. Supp. 3d 714, 748 (S.D. Ohio 2017) (quotations omitted) (“Self-defense also involves a proportionality requirement: the accused is privileged to use that force which is reasonably necessary to repel the attack.”).

²² See, e.g., FLA. STAT. § 776.041(1) (2018) (“The justification described in the preceding sections of this chapter is not available to a person who . . . Initially provokes the use or threatened use of force against himself or herself[.]”).

²³ JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 227 (7th ed. 2015).

²⁴ See Beard v. United States, 158 U.S. 550, 555 (1895) (“There is but one place where he need not retreat any further, where he need not go away from the danger, and that is in his dwelling-house.”).

²⁵ See, e.g., KAN. STAT. ANN. § 21-5223 (2018) (justifying deadly force to prevent unlawful entry); MISS. CODE ANN. § 97-3-15(1)(e) (2018) (justifying deadly force to prevent “any felony”); N.Y. PENAL LAW § 35.15(2) (2018) (justifying deadly force to prevent “kidnapping, forcible rape, forcible criminal sexual act or robbery”); State v. Martinez, 230 P. 379, 384 (N.M. 1924) (justifying deadly force to prevent rape).

²⁶ DRESSLER, *supra* note 23, at 238.

the reasonableness of his or her conduct. In making that determination, the facts or circumstances must be taken as perceived by the defendant, even if they were not the true facts or circumstances, so long as a reasonable person in the defendant's position could also reasonably perceive the facts or circumstances in that way. If the fact or circumstance relied upon by the defendant to justify a belief of imminent danger or the need to use deadly force to meet that danger is so improbable that no reasonable person in the defendant's position would perceive it to be the case, the jury cannot be directed to assume that fact or circumstance in judging the reasonableness of the defendant's conduct, for that would skew the whole analysis of reasonableness.²⁷

Thus, "a person may only defend himself if he subjectively believes that deadly force is required *and* a reasonable person would also believe that it is appropriate under the circumstances."²⁸ Accordingly, jurors may consider all factors previously known to the defendant about his victim, as well as the factors that the defendant was faced with at the time he used deadly force. As discussed more fully in Section III, jurors in either jurisdiction may consider the "physical attributes of all persons involved, including the defendant" in determining whether the defendant's fear of the victim was reasonable.²⁹

B. *Stand Your Ground: The Substantive Facet*

The states that have enacted stand your ground statutes have adopted one, or both, facets of stand your ground: the substantive facet and/or the procedural facet—procedure is not adopted without substance, but substance may be adopted alone.³⁰ The substantive facet offers defendants an affirmative defense to be used at trial against a charge of criminal homicide which, if argued successfully, results in an acquittal.³¹ The procedural facet, adopted by only a handful of states, offers defendants the right to a pre-trial

²⁷ *State v. Marr*, 765 A.2d 645, 652 (Md. 2001) (internal citations omitted).

²⁸ DRESSLER, *supra* note 23, at 238.

²⁹ *People v. Goetz*, 497 N.E.2d 41, 52 (N.Y. 1986).

³⁰ *See, e.g.*, LA. STAT. ANN. § 14:20(C)-(D) (2018).

³¹ In *Mosansky v. State*, the First District Court of Appeal explained the legal consequences of a successful affirmative defense:

[Self-defense] is an affirmative defense that has the effect of legally excusing the defendant from an act that would otherwise be a criminal offense. The defendant has the burden of presenting sufficient evidence that he acted in self-defense in order to be entitled to a jury instruction on the issue. But the presentation of such evidence does not change the elements of the offense at issue; rather, it merely requires the state to present evidence that establishes beyond a reasonable doubt that the defendant did not act in self-defense.

³³ So. 3d 756, 758 (Fla. Dist. Ct. App. 2010) (citations omitted).

immunity hearing at which they may argue that they acted lawfully in self-defense and, if argued successfully, grants them immunity from further criminal prosecution.³²

Focusing on the substantive facet of stand your ground, this section explains the sound policy considerations underlying Florida's self-defense law, the minimal role of an affirmative duty to retreat, and the even more minimal role of stand your ground in George Zimmerman's trial. In doing so, this section attempts to shift stand your ground critics' attention away from the law's substance and towards its application in jury instructions.

1. The Rationales Underlying Stand Your Ground

The substantive facet of stand your ground is a historical fixture of self-defense law. In 1921, Justice Oliver Wendell Holmes characterized the no retreat rule as being "consistent with human nature":

[I]f a man reasonably believes that he is in immediate danger of death or grievous bodily harm from his assailant he may stand his ground and that if he kills him he has not exceeded the bounds of lawful self-defense . . . Detached reflection cannot be demanded in the presence of an uplifted knife. Therefore in this Court, at least, it is not a condition of immunity that one in that situation should pause to consider whether a reasonable man might not think it possible to fly with safety or to disable his assailant rather than to kill him.³³

For Justice Holmes, "Stand Your Ground was the right approach not just because it had in fact become widely accepted by many states, but also because it more accurately reflected the behavior and the capacities of human beings under the stress of imminent attack and possible death."³⁴ Thus, to impose a duty to retreat would be to ignore the realities about the "human capacity for rational deliberation under severe emotional distress."³⁵ This rationale also finds support in contemporary neuroscience, which suggests that "(1) the limbic system of the brain, which controls basic emotions

³² See, e.g., ALA. CODE § 13A-3-23(d)(1) (2019); FLA. STAT. § 776.032(1) (2018); GA. CODE ANN. § 16-3-24.2 (2018); KAN. STAT. ANN. § 21-5231 (2018); KY. REV. STAT. ANN. § 503.085 (West 2018); N.C. GEN. STAT. § 14-51.2(e) (West 2018); OKLA. STAT. tit. 21, § 1289.25(F) (2018); S.C. CODE ANN. § 16-11-450 (2018). For a general overview of pre-trial immunity hearings and the similarities and differences among the states that offer them, see Benjamin M. Boylston, *Immune Disorder: Uncertainty Regarding the Application of "Stand Your Ground" Laws*, 20 BARRY L. REV. 25 (2014) (note: this was published three years before the 2017 amendment to Florida's stand your ground statute discussed in Section II.C).

³³ *Brown v. United States*, 256 U.S. 335, 343 (1921).

³⁴ Ward, *supra* note 8, at 104.

³⁵ *Id.* at 105.

including fear and anger, can overwhelm the rational faculties in times of great stress, and (2) such emotional flooding may drive an individual's decisions in ways of which even the individual is unaware."³⁶

For other stand your ground supporters, the rule ensures the most reasonable version of events. In 1876, the Ohio Supreme Court defended stand your ground not merely "to repel a mere trespass, or even to save life . . . but [because] a true man, who is without fault, is not obliged to fly from an assailant, who, by violence or surprise, maliciously seeks to take his life or do him enormous bodily harm."³⁷ Thus, "the surest [way] to prevent the occurrence of occasions for taking life [is to let] the would-be robber, murderer, ravisher, and such like, know that their lives are, in a measure, in the hands of their intended victims."³⁸

Moreover, stand your ground supporters adopt the rule in an effort to achieve clarity in the law. Supporters note that (a) "it is often quite difficult for a jury to determine whether a person should reasonably believe that he may retreat from a violent attack in complete safety"; and (b) "a rule which requires a non-aggressor to retreat may confuse the jury and lead to inconsistent verdicts."³⁹ Thus, stand your ground "increases clarity because it obviates the need for the jury to inquire into the often-unanswerable question of whether a defender actually knew of a retreat option and knew that it was completely safe."⁴⁰

Last, stand your ground supporters agree that the rule protects more innocent defenders than the retreat rule. "A duty of retreat forces an innocent defender, in the moment of being attacked, to assess his options for escape and to act on those options if possible, before responding with deadly force."⁴¹ Considering how much time an innocent defender may waste in making that assessment—particularly in a situation in which every second that passes may be the defining moment between life and death—the duty to retreat favors the life of an unlawful aggressor over that of an innocent defender.⁴² If faced with a Hobson's choice of choosing between the life of an innocent person and the life of an unlawful aggressor, "the law should side with the former and not the latter."⁴³

³⁶ *Id.*

³⁷ *Erwin v. State*, 29 Ohio St. 186, 199–200 (1876).

³⁸ *Id.* at 200.

³⁹ *Culverson v. State*, 797 P.2d 238, 240 (Nev. 1990).

⁴⁰ *Ward*, *supra* note 8, at 107.

⁴¹ *Id.*

⁴² *Id.*; see ARNOLD H. LOEWY, CRIMINAL LAW IN A NUTSHELL 78 (5th ed. 2009) ("The rationale for the . . . 'no retreat' rule is that a person should not be required to resort to what some might deem cowardice in order to spare the life of the one who precipitated the difficulty in the first place.").

⁴³ *Ward*, *supra* note 8, at 107.

2. The Non-Existent Role of Stand Your Ground in *State v. Zimmerman*

As much as stand your ground's critics may want a complete overhaul of Florida's self-defense law, a retreat statute will simply not deter gun violence by those who want to engage in it.⁴⁴ The hotly debated *Zimmerman* trial helps illustrate why the demand for an affirmative duty to retreat is misguided. In 2012, self-appointed neighborhood watchman George Zimmerman shot and killed seventeen-year-old Trayvon Martin after he noticed Trayvon in a Central Florida residential neighborhood.⁴⁵ On a call to 911, the dispatcher instructed Zimmerman to cease from following Trayvon.⁴⁶ Despite that instruction, Zimmerman continued to follow Trayvon, eventually confronting him and engaging in a physical altercation with him. Sometime during the altercation, Zimmerman shot and killed Trayvon, later claiming self-defense at trial. Although it is undisputed that Zimmerman initiated the confrontation, it is unclear from the facts whether Trayvon somehow escalated the altercation⁴⁷ (thus justifying Zimmerman's use of deadly force), or, whether Zimmerman used deadly force without actually facing a deadly attack (thus constituting an unlawful use of deadly force).

To better understand the minimal role of an affirmative duty to retreat, consider an exception to the retreat rule: defendants in a retreat jurisdiction do not have a duty to retreat unless they *know* they can retreat in *complete safety*.⁴⁸ And even though the reasonable person might know that he could

⁴⁴ Philip Lentz, *Goetz Confession Tells Intent to Kill*, CHIC. TRIB. (Apr. 30, 1987), <https://www.chicagotribune.com/news/ct-xpm-1987-04-30-8702020166-story.html> (“‘I know this sounds horrible,’ Bernhard Goetz said in a flat voice. ‘But my intention was to murder them, to hurt them, to make them suffer as much as possible.’”).

⁴⁵ See Jeffrey Toobin, *The Facts in the Zimmerman Trial*, THE NEW YORKER (July 16, 2013), <https://www.newyorker.com/news/daily-comment/the-facts-in-the-zimmerman-trial>.

⁴⁶ See Cjetboy, *George Zimmerman 911 Call About Trayvon Martin Unredacted*, YOUTUBE (Mar. 20, 2012), <https://www.youtube.com/watch?v=o9A-gp8mrdw> (“Dispatcher: ‘Are you following him?’ Zimmerman: ‘Yeah.’ Dispatcher: ‘OK, we don’t need you to do that.’”).

⁴⁷ Partially corroborated by Zimmerman's wounds on the back of his head, allegedly received when Trayvon was on top of him and repeatedly slammed Zimmerman's head into the pavement. See Lizette Alvarez, *Martin Was Shot as He Leaned over Zimmerman, Court Is Told*, N.Y. TIMES (July 9, 2013), <https://www.nytimes.com/2013/07/10/us/teenager-was-over-zimmerman-as-he-was-shot-expert-says.html>.

⁴⁸ Ward, *supra* note 8, at 110 (“If a safe retreat is not possible, and the other elements of self-defense are present, a defendant may stand his or her ground and respond with force, including deadly force, if the defendant reasonably fears for his or her life.”); see also Hoong v. Lopez, No. 2:10-cv-01247-JKS, 2012 U.S. Dist. LEXIS 144087, at *32–33 (E.D. Cal. Oct. 3, 2012) (“An aggressor or a mutual combatant must retreat and communicate withdrawal from the fight before being entitled to assert any form of self-defense; the exception is where a simple assault is met with deadly or other ‘excessive’ force that is too sudden to permit safe retreat and withdrawal, at which point the defendant may employ deadly force in self-defense.”).

have retreated in complete safety, the defendant would not be under a duty to retreat unless he *subjectively* knew that he could.⁴⁹ This could result in situations where a defendant “stands his ground” knowing he could safely retreat but chooses not to do so and later claims (untruthfully) at trial that he did not know he could retreat in complete safety. This is no different from the kind of encounters that stand your ground statutes spawn.

For example—assuming the facts were unmistakably clear about the series of events that played out after Zimmerman confronted Trayvon—consider how the trial would have played out in a retreat jurisdiction:

- If Zimmerman was the first aggressor, but Trayvon escalated the altercation from using non-deadly force (e.g., knocks and blows that would have caused nothing more than bruising and bleeding) to using deadly force (e.g., knocks and blows that would have caused serious bodily injury or death), Zimmerman could have argued that he did not *know* that he could have retreated in *complete* safety. Zimmerman would have then been justified in his belief that he needed to use deadly force to avoid Trayvon using deadly force against him—thereby relieving Zimmerman of his duty to retreat.⁵⁰
- Alternatively, if Trayvon did not escalate the altercation to the point of Zimmerman’s fear of a deadly attack but rather, Zimmerman faced a non-deadly attack, Zimmerman could have argued at trial that he had to defend himself by engaging in the altercation with non-deadly force (i.e., fighting back). However, had Trayvon further escalated the attack, Zimmerman would be, once again, relieved of the duty to retreat before using deadly force.

From a purely substantive standpoint, it is not clear that any legal issue in the *Zimmerman* case turned on the presence of Florida’s stand your ground statute.⁵¹ Duty to retreat or no duty to retreat, *State v. Zimmerman* may have resulted in the same exact acquittal, especially considering the trial’s other various failures.⁵² In other words, stand your ground is not the reason that the community is left feeling that justice for Trayvon Martin has not been served;

⁴⁹ See LOEWY, *supra* note 42, at 79.

⁵⁰ Ward, *supra* note 8, at 110 (“If [the facts about Zimmerman shooting Trayvon Martin out of fear for his life when Martin was on top of him were true], then regardless of what the law or the jury instructions said, Zimmerman had no opportunity to retreat—no choice but to stay where he was and defend himself.”).

⁵¹ *Id.* at 109.

⁵² See discussion *infra* Section III.B.

the true mistake in the Zimmerman trial lies in the fact that the jurors were not read the instructions on Manslaughter.

The model jury instructions for Manslaughter state that a defendant is guilty if his culpable negligence caused the victim's death.⁵³ To determine culpable negligence, jurors may consider the pattern of conduct that preceded the altercation and use of deadly force.⁵⁴ Had they been so instructed, the 911 call on which the dispatcher explicitly instructed Zimmerman to cease from following Trayvon would have helped the State get a charge of Manslaughter that is not so easily disposed of with a self-defense theory.

Instead, jurors were instructed on Second-Degree Murder, which only results in a conviction if the defendant's acts evince a depraved mind regardless of human life, through a showing of "ill will, hatred, spite, or an evil intent, [that] is of such a nature that the act itself indicates an indifference to human life."⁵⁵ Only if the State proves all elements of a crime beyond a reasonable doubt does the defendant put on a self-defense case.⁵⁶ Despite Zimmerman's indisputable recklessness in pursuing, confronting, and killing Trayvon Martin, the State did not have any evidence of evil intent that would have survived a beyond a reasonable doubt standard.⁵⁷ Consequently, as a result of the State's decision to try Zimmerman for Second-Degree Murder, rather than Manslaughter, and the State's subsequent failure to meet the elements of Second-Degree Murder, Zimmerman was acquitted of all charges of homicide—without a need for Zimmerman to ever put on a self-defense case.⁵⁸ Understanding the State's lapse in judgment reveals the truth: stand your ground played little to no role in Zimmerman's acquittal. Despite stand your ground's critics' well-intentioned efforts to highlight the unfortunate realities of race relations in Florida, the law's role in *State v. Zimmerman* was more prevalent in the press than in the courtroom.

⁵³ FLORIDA STANDARD JURY INSTRUCTIONS 7.7: MANSLAUGHTER, <https://jury.flcourts.org/criminal-jury-instructions-home/criminal-jury-instructions/sji-criminal-chapter-7/>.

⁵⁴ *Id.*

⁵⁵ FLORIDA STANDARD JURY INSTRUCTIONS 7.4: SECOND-DEGREE MURDER, <https://jury.flcourts.org/criminal-jury-instructions-home/criminal-jury-instructions/sji-criminal-chapter-7/>.

⁵⁶ *Gilmore v. Taylor*, 508 U.S. 333, 341 (1993) ("States must prove guilt beyond a reasonable doubt with respect to every element of the offense charged, but [they] may place on defendants the burden of proving affirmative defenses.").

⁵⁷ *Ward*, *supra* note 8, at 110 ("Proving its version of the facts beyond a reasonable doubt is, of course, the job of the prosecution seeking a conviction in every criminal case—not just those involving self-defense.").

⁵⁸ FLA. R. CRIM. P. 3.380(a) ("If, at the close of the evidence for the state or at the close of all the evidence in the cause, the court is of the opinion that the evidence is insufficient to warrant a conviction, it may, and on the motion of the prosecuting attorney or the defendant shall, enter a judgment of acquittal."); *Penton v. State*, 548 So. 2d 273, 274 (Fla. Dist. Ct. App. 1989) ("It is axiomatic that the state has the burden of proving each of the various elements of the offense, and that it must, in order to avoid the entry of a judgment of acquittal, produce legally sufficient evidence of each element.").

C. *Stand Your Ground: The Procedural Facet*⁵⁹

In jurisdictions that adopt the procedural facet of stand your ground, a person who is justified in using deadly force in an act of self-defense is immune from criminal prosecution, including arrest, detainment in custody, and being charged or prosecuted.⁶⁰ Accordingly, defendants claiming self-defense are entitled to a pre-trial immunity hearing “where the person’s substantive right to Stand Your Ground immunity is [determined] by the trial court.”⁶¹ Under current Florida law, once a prima facie claim of self-defense has been raised by the defendant at the pre-trial immunity hearing, the State carries the burden by clear and convincing evidence to overcome the self-defense immunity.⁶² The statute that placed this burden of proof on the State was based on Chief Justice Canady’s dissent in *Bretherick v. State*.⁶³ In his dissent, Chief Justice Canady recognized that, according to the text of the statute, the Florida Legislature clearly intended to *grant* defendants the benefit of stand your ground immunity:

There is no reason to believe that the Legislature intended for a defendant to be denied immunity and subjected to trial when that defendant would be entitled to acquittal at trial on the basis of a Stand Your Ground defense. But the majority’s decision here guarantees that certain defendants who would be entitled to acquittal at trial will nonetheless be deprived of immunity from trial.⁶⁴

The Florida Legislature expressed their agreement,⁶⁵ and in 2017, they “changed the quantum of proof required from preponderance of the evidence previously required of the defendant to clear and convincing evidence now required of the state, after the defendant makes a prima facie claim of self-

⁵⁹ Unfortunately, there is no opportunity to discuss *State v. Zimmerman* as it relates to the pre-trial immunity hearing because Zimmerman waived his right to it. It must be noted that this decision occurred in 2013, prior to the amendment that placed the burden on the State to disprove the defense. In such a close case, it was wiser for a defendant to waive his right to the hearing than to risk being unable to meet his burden. See Yamiche Alcindor, *Zimmerman Waives Pre-trial Immunity Hearing*, USA TODAY (Apr. 30, 2013, 7:49 AM), <https://eu.usatoday.com/story/news/nation/2013/04/30/trayvon-martin-zimmerman-self-defense-hearing/2122991/>.

⁶⁰ FLA. STAT. § 776.032(1) (2018).

⁶¹ *Love v. State*, 247 So. 3d 609, 611 (Fla. Dist. Ct. App. 2018).

⁶² FLA. STAT. § 776.032(4) (2018).

⁶³ FLA. S. COMM. ON JUDICIARY, CS/SB 128 (2017) STAFF ANALYSIS (2017) [hereinafter Bill Analysis Statement], <http://www.flsenate.gov/Session/Bill/2017/128/Analyses/2017s00128.rc.PDF>.

⁶⁴ *Bretherick v. State*, 170 So. 3d 766, 780 (Fla. 2015) (Canady, J., dissenting).

⁶⁵ “The dissenting opinion in *Bretherick*, however, interpreted the existing substantive right to assert immunity and concluded that the state has the burden of proof. Consistent with the *Bretherick* dissent, the bill places the burden of proof on the state at pretrial immunity hearings.” Bill Analysis Statement, *supra* note 63, at 1.

defense immunity.”⁶⁶ Not only did the amendment change the quantum of proof required to receive criminal immunity, but it also shifted the burden from the defendant to the State. This shift did not come without its criticisms.⁶⁷

In October of 2018, the League of Prosecutors, a Miami organization of current and former local prosecutors,⁶⁸ filed a brief of amicus curiae on the issue of the constitutionality of section 776.032.⁶⁹ Among their many criticisms, the League claims that the burden “unlawfully forces state attorneys to try cases involving self-defense claims before a judge, not a jury.”⁷⁰ Critics of the 2017 amendment are concerned with the burden shift to the State, including the higher burden that accompanies the shift, the fact that “the pretrial immunity hearing is in fact a full-blown trial with the judge acting as the trier of fact,” and that stand your ground immunity is the “only legislatively created pretrial immunity statute for a criminal prosecution which requires the judge, as the fact finder, to determine whether the defendant has a legal excuse for committing the alleged criminal acts, essentially an affirmative defense . . . [which] has historically been the province of a jury.”⁷¹

Although the League of Prosecutors—along with the amendment’s many other critics—makes valid arguments for wanting a defendant to carry his own burden at the pretrial stage, they fail to address the simple fact that at trial, the State has the ultimate burden of proving beyond a reasonable doubt that the defendant was not justified in using deadly force. If the State

⁶⁶ *Hight v. State*, 2018 Fla. App. LEXIS 11122 at *7 (Fla. Dist. Ct. App. 2018).

⁶⁷ Noreen Marcus, ‘Stand Your Ground on Steroids’ Before Florida Supremes: Flood of Cases Could Be Reopened, FLA. BULLDOG (Nov. 13, 2018), <https://www.floridabulldog.org/2018/11/stand-your-ground-on-steroids-before-florida-supremes-flood-of-cases-could-be-reopened/> (“[Miami-Dade State Attorney, Katherine Fernandez Rundle said,] [f]or us, it’s like putting on a whole trial before you have to put the trial on.”).

⁶⁸ LEAGUE OF PROSECUTORS - FLORIDA, <https://leagueofprosecutors.org> (last visited Apr. 6, 2019).

⁶⁹ Brief for League of Prosecutors - Florida as Amicus Curiae in Support of Neither Party, *Love v. State*, 247 So. 3d 609 (Fla. Dist. Ct. App 2018) (No. SC18-747), 2018 WL 5478954 [hereinafter Brief for League of Prosecutors - Florida].

⁷⁰ David Ovalle, *Florida’s Stand Your Ground Law Is Unconstitutional, Miami’s Top Prosecutor Tells High Court*, MIAMI HERALD (Oct. 30, 2018, 7:00 AM), <https://www.miamiherald.com/news/local/crime/article220784125.html#storylink=cpy>.

⁷¹ Brief for League of Prosecutors - Florida, *supra* note 69, at *12; *see also* Brief for Giffords Law Center as Amicus Curiae to Prevent Gun Violence, *Love v. State*, 247 So. 3d 609 (Fla. Dist. Ct. App 2018) (No. SC18-747), 2018 WL 5635053 at *19 (“Shifting the burden to the State and raising the quantum of proof as contemplated by the 2017 Amendment will make it easier for defendants who are not entitled to Stand Your Ground immunity to avoid criminal prosecution, and may exacerbate the disparate impacts demonstrated under the law.”); Brief for University of Miami School of Law Federal Appellate Clinic as Amicus Curiae in Support of Neither Party, *Love v. State*, 247 So. 3d 609 (Fla. Dist. Ct. App 2018) (No. SC18-747), 2018 WL 5635054 at *22 (“The unconstitutional pre-trial hearing that the statute purports to authorize is nothing other than a way to short-circuit the judicial process. Any legitimate protection it affords is already provided by the availability of jury trials.”).

cannot prove by clear and convincing evidence that the defendant was not justified in using deadly force at the pretrial immunity hearing where they have only one person to convince, they have no chance of defeating the claim at trial where they bear a much heavier burden⁷² and have six people to convince. Moreover, despite the amendment's burden shift from the defendant to the State, defendants often waive their right to a pre-trial immunity hearing if they (and their defense attorney) doubt their ability to assert a successful self-defense claim—again eliminating the possibility that they will get a get-out-of-jail-free card before trial ever begins.⁷³

Finally, the Supreme Court of Florida has previously concluded that “the plain language of section 776.032 grants defendants a *substantive* right to assert immunity from prosecution and to avoid being subjected to a trial.”⁷⁴ Therefore, the statutory immunity granted to defendants in the 2017 amendment is a substantive right that the Legislature has a right to enact,⁷⁵ and a right that the Court cannot take away. Although this amendment aptly reveals the Florida Legislature's controversial position on self-defense, it does very little to change the structure of criminal litigation.

⁷² Professor Giannelli has best captured the difference between the “clear and convincing” and “beyond a reasonable doubt” standard:

The “clear and convincing evidence” standard is an intermediate standard, requiring more convincing force than the “preponderance of evidence” standard but less than the “beyond a reasonable doubt” standard. The term “highly probable” is as good as we can probably do in describing this standard. . . . The “beyond a reasonable doubt” standard is the most demanding standard and applies almost exclusively in criminal cases.

PAUL C. GIANNELLI, UNDERSTANDING EVIDENCE 47–48 (4th ed. 2013); see also C.M.A. McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?*, 35 VAND. L. REV. 1293, 1297 (1982) (quotations omitted) (describing the “clear and convincing” standard as what *highly probably* has happened and the “beyond a reasonable doubt” standard as what *almost certainly* has happened); Fredrick E. Vars, *Toward a General Theory of Standards of Proof*, 60 CATH. U. L. REV. 1, 20 (2010) (ascribing a 71% confidence level to meet the “clear and convincing” standard and 91% confidence level to meet the “beyond a reasonable doubt” standard).

⁷³ See Lizette Alvarez, *Zimmerman Forgoes Pretrial Hearing, Taking Issue of Immunity to a Jury*, N.Y. TIMES (Apr. 30, 2013), <https://www.nytimes.com/2013/05/01/us/george-zimmerman-waives-right-to-pretrial-hearing.html>; Erik Waxler, *Michael Drejka Will Not Use Stand Your Ground as Defense at Trial, Opting for Jury Decision*, ABC ACTION NEWS (June 7, 2019, 4:57 PM), <https://www.abcactionnews.com/news/region-pinellas/michael-drejka-will-not-use-stand-your-ground-as-defense-at-trial-opting-for-jury-decision>.

⁷⁴ *Dennis v. State*, 51 So. 3d 456, 462 (Fla. 2010) (emphasis added).

⁷⁵ *Massey v. David*, 979 So. 2d 931, 936 (Fla. 2008) (“Generally, the Legislature is empowered to enact substantive law while [the Court] has the authority to enact procedural law.”). Moreover, an argument that the 2017 Amendment is unconstitutional because it is a mix of procedure and substance may fail, considering that “where a statute contains some procedural aspects, but those provisions are so intimately intertwined with the substantive rights created by the statute, that statute will not impermissibly intrude on the practice and procedure of the courts in a constitutional sense, causing a constitutional challenge to fail.” *Id.* at 937.

D. *Much Ado About Nothing*

The unending focus on stand your ground's lack of an affirmative duty to retreat and the pre-trial immunity hearing is a grave mistake if critics of stand your ground want to make a change in Florida law. Neither statute is illogical nor unconstitutional. Florida's stand your ground statute makes two things clear: (1) a person's right to use deadly force against another arises at the moment of a prior, uninvited, and unlawful imminent threat of deadly force of serious bodily injury—and *only* at that moment—and (2) a *subjective* fear of such force is not enough to trigger the right or the subsequent immunity—it must also be *objectively* reasonable. Moreover, the State, as the party seeking to overcome the immunity *granted* by the Florida Legislature, has but one small hurdle to overcome before a single judge—an aspect that none of the amendment's critics seem to acknowledge.

If prosecutors, defenders, defendants, victims, and Floridians want to make a change, they must face some realities about the state of the Florida Legislature. Less than two years ago, the Florida Senate attempted to place the pre-trial immunity hearing burden on the State. Importantly, in the working stages of the amendment, the Senate did not initially seek to burden prosecutors with a clear and convincing standard. Rather, the Senate sought to burden the State with a *beyond a reasonable doubt* standard—a substantially higher burden to meet.⁷⁶

Clearly, the Florida Legislature—despite Floridians' passionate protests and the pervasive blatant disregard for the lives of black males displayed by wannabe vigilantes—still supports stand your ground and is willing to do all it can to keep it alive and well. So, if the proposed change to Florida law is going to be ahead of the culture in which it was born, it needs to be aligned with the assurance that it will be supported and enacted. Therefore, considering the realities of the state of the law, stand your ground must be impacted at the end of the process, rather than at its start. Jury instructions is where change must be made and where change will be felt.

III. ANALYSIS

Because the main inquiry in a self-defense case is whether the defendant felt he truly needed to use deadly force in order to defend himself (and in turn, whether the reasonable man would have also feared the victim and used

⁷⁶ See Bill Analysis Statement, *supra* note 63, at 1 (seeking to place the burden on the State to disprove the self-defense theory beyond a reasonable doubt at the pre-trial immunity hearing); Kristen M. Clark, *Senate's Changes to Stand Your Ground Ready for Floor Vote Next Month*, MIAMI HERALD (Feb. 9, 2017, 2:10 PM), <https://www.miamiherald.com/news/politics-government/state-politics/article131715629.html> (explaining that the original proposal placed a beyond a reasonable doubt burden on the State); see *infra* note 72 and accompanying text.

deadly force against him), jurors should be able to consider all of the details that the defendant was aware of—either by way of knowledge gained before the altercation or by visual inspection at the time of the altercation—at the time he used deadly force. For example, jurors should be able to consider the physical movements of the victim,⁷⁷ the presence of threats or weapons,⁷⁸ and the location of the incident.⁷⁹ Jurors may also consider “any relevant knowledge” that the defendant had about the victim, such as whether he was under the influence of drugs⁸⁰ or whether the victim had a reputation for violence,⁸¹ which may instill a reasonable fear that the victim was dangerous. Finally, jurors may consider the “physical attributes of all persons involved, including the defendant.”⁸²

The point of taking these factors into consideration during deliberation is so that jurors will be able to determine whether, if placed in the defendant’s position, they would have also feared the victim and used deadly force against them in an act of self-defense. If the jurors find that they would have also used deadly force, then they should find that the defendant was justified. If they would not have used deadly force, then they should find that the

⁷⁷ See, e.g., *Jackson v. Edwards*, 404 F.3d 612, 624 (2d Cir. 2005) (justification charge warranted where defendant shot unarmed but heavily intoxicated man who had allegedly pushed and punched him); *Davis v. Strack*, 270 F.3d 111, 119–20, 130 (2d Cir. 2001) (justification charge warranted where defendant shot man who had attacked him on previous occasions after the man moved his hand toward his waist and started to turn toward defendant); *People v. Ligouri*, 31 N.E.2d 37, 41 (N.Y. 1940) (victim unexpectedly pulled out a gun and snapped it on the defendant).

⁷⁸ *Commonwealth v. Vidito*, 487 N.E.2d 206, 210 (Mass. App. Ct. 1985) (victim had the defendant in a life-threatening chokehold).

⁷⁹ *Id.*; see, e.g., *Commonwealth v. Shafer*, 326 N.E.2d 880, 884 (Mass. 1975) (self-defense charge not warranted where evidence showed that the defendant could have left the basement with her children, thus avoiding the use of deadly force).

⁸⁰ See, e.g., *People v. Frazier*, 776 N.Y.S.2d 294, 296 (N.Y. 2004) (“[Whether] the victim had ingested [Angel Dust] before the altercation . . . was relevant on the issue of whether it was objectively reasonable for [the] defendant to perceive him as dangerous.”); *People v. Chevalier*, 220 A.D.2d 114, 117 (N.Y. 1996) (“Since [the victim’s] recent [use of alcohol, cannabis, and cocaine] was a potentially powerful objective causal factor of his purportedly ‘crazy’ conduct, and since a person under the influence of both alcohol and drugs might well be perceived—even by an observer unaware of the cause of the conduct—as acting more dangerously than one who had merely been drinking, the evidence of [the victim’s] drug use was admissible and relevant to the justification defense.”).

⁸¹ See, e.g., *Davis*, 270 F.3d at 129–30 (“Davis knew that Bubblegum, a six-foot tall, 435-pound felon, had robbed, raped, and beaten other people at gun point. Bubblegum had robbed Davis at gun point three times, forced him to strip naked twice, raped him once, once urged his co-assailant to shoot Davis, and at their last meeting, after raping him, promised to kill Davis when he next saw him. This was that next meeting.”); *People v. Stallworth*, 364 Mich. 528, 537 (1961) (holding that evidence of the victim’s reputation for “quarrelsomeness, ferocity, brutality, and vindictiveness while . . . intoxicated” was relevant in determining whether the defendant believed that an impending attack by the victim required the use of deadly force).

⁸² *People v. Goetz*, 497 N.E.2d 41, 52 (N.Y. 1986); see, e.g., ZIMMERMAN V. STATE JURY INSTRUCTIONS, available at https://media.cmgdigital.com/shared/news/documents/2013/07/12/jury_instructions_1.pdf (“In considering the issue of self-defense, you may take into account the relative physical abilities and capacities of George Zimmerman and Trayvon Martin.”) (last visited Apr. 6, 2019).

defendant may not avail himself of self-defense immunity. Therefore, it is not surprising, nor is it problematic, that jurors should be able to consider both the defendant and victim's physical characteristics in making their reasonableness determination.

However, courts rarely address whether race is an appropriate physical characteristic to consider in making their reasonableness determination and often leave race out of the conversation, altogether. Rather than acknowledge the elephant in the room, courts sweep it under the rug—ignoring both the realities of white shooters' outward prejudices and jurors' subconscious ones.

A. Subconscious Bias

“Many influences condition and direct our reactions to the world even when we are not aware of them. Racism, in particular, operates largely in the realm of the unconscious.”⁸³ An unfortunate dilemma that American society faces (both historically and presently) is the “well-documented and nearly universal tendency of Americans to have unconscious patterns of bias against African Americans in general and black males in particular, as well as the psychosocial and sociological costs that these patterns exact on black males.”⁸⁴

In 2011, the Opportunity Agenda published a social science literature review focusing on “the question of how media, and communications more broadly, affect outcomes for black men and boys in American society.”⁸⁵ Their review compiled dozens of studies that revealed broad patterns in television, advertising, and video games, including overall underrepresentation,⁸⁶ an exaggeration of negative associations,⁸⁷ a limited

⁸³ Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 811 (1994); see also Elizabeth Elkin, et al., *What You Need to Know About 'Stand Your Ground' Laws*, CNN (July 29, 2018, 12:03 AM), <https://www.cnn.com/2018/07/29/us/stand-your-ground-law-explainer-trnd/index.html> (“Even those who do not consciously harbor negative associations between race and criminality are regularly infected by unconscious views that equate race with violence.”).

⁸⁴ OPPORTUNITY AGENDA, SOCIAL SCIENCE LITERATURE REVIEW: MEDIA REPRESENTATIONS AND IMPACT ON THE LIVES OF BLACK MEN AND BOYS 1, 20 (2011), <http://www.racialequitytools.org/resourcefiles/Media-Impact-onLives-of-Black-Men-and-Boys-OppAgenda.pdf>.

⁸⁵ *Id.* at 13.

⁸⁶ “In a 1997 sample of network news clips, black speakers accounted for less than” 3% of the experts called on to comment on various issues. *Id.* at 23 (citations omitted).

⁸⁷ Particularly criminality and poverty. In a 1993–1994 sample of network news clips, stories about black criminals were four times more likely to include mug shots than stories about white criminals. *Id.* at 24 (citations omitted).

representation of positive associations,⁸⁸ and a general lack of context which ignores “historical antecedents of black economic disadvantage and persistence of anti-black male bias.”⁸⁹ Of the various forms of media that researchers in this field explore, crime reporting is perhaps the most important form of media to discuss within the theoretical framework of racial equality for several reasons:

[C]rime reporting is seen as a direct reflection of a community’s health and functioning, which is universally relevant to any person who resides in that community; content of crime reporting has a direct influence on the audience’s perception of personal identity and perception of other race members; and the influence of media habitually depicting members of a race within a given context determines how members of an audience think about that behavior itself, namely crime. If it truly is the case that Black people are depicted the most in crime reporting over any other race, then it would follow that audience members will proceed to associate crime with Black people, and a problematic perception of that race will develop.⁹⁰

Consistent patterns in portrayals of black males as criminal and violent can be expected to, and undoubtedly do, promote exaggerated views of criminality and violence. For example, the Opportunity Agenda cites to studies which show that the “amygdala, a brain region associated with experiencing fear, tends to be active when whites view an unfamiliar black male face (regardless of their conscious reports about racial attitudes).”⁹¹ Studies that involved game-like simulations have shown that white persons are more likely to shoot an unarmed black male than an unarmed white male.⁹² Word-association studies confirm that whites tend to more easily associate positive words (e.g., peace, joy, and friend) with unknown white faces and negative words (e.g., failure, evil, and war) with unknown black faces.⁹³ One study revealed that an act (specifically, an ambiguous shove)

⁸⁸ Black males are highly associated with physicality and physical achievement in a culture that values “machismo,” but at the expense of being absent from important roles such as being emotionally intelligent or financially successful. *Id.* at 24–25 (citations omitted).

⁸⁹ *Id.* at 13–14.

⁹⁰ Kassia E. Kulaszewicz, *Racism and the Media: A Textual Analysis 12* (2015) (unpublished clinical research paper) (on file with St. Catherine University), https://sophia.stkate.edu/msw_papers/477/; see also Entman & Gross, *supra* note 11, at 103 (describing how media coverage that overrepresents black persons as criminals develops a “‘crime script’ in which crime is violent and perpetrators are black[]”).

⁹¹ OPPORTUNITY AGENDA, *supra* note 84, at 30 (citations omitted).

⁹² *Id.* at 32 (citations omitted).

⁹³ *Id.* at 31 (citations omitted).

was interpreted as more violent when performed by a black person than a white person.⁹⁴ Another study found that over 56% of Americans consciously believe that black persons tend to be prone to violence.⁹⁵

The true misfortune of the results of these studies is the fact that black persons are not any more prone to violence than any other race. In the Federal Bureau of Investigation's 2016 report on annual arrests, the Bureau reported that 241,063 arrests were made of white persons committing violent crimes, whereas 153,341 arrests were made of black persons for the same crimes.⁹⁶ The Bureau also reported that 738,319 arrests were made of white persons committing property crimes, whereas 301,958 arrests were made of black persons for the same crimes.⁹⁷

Despite such undeniable evidence that prejudices against black males have no basis in reality, "the media's ability to construct realities that do not necessarily accord with official statistics and other factual data . . . exaggerate the actual racial disproportion[,]"⁹⁸ which in turn leads to considerable costs at the expense of black males in ways that transcend harmless simulations and word-association experiments:

Biased interpretation can have substantial real-world consequences. Consider a teacher whose schema inclines her to set lower expectations for some students, creating a self-fulfilling prophecy. Or a grade school teacher who must decide who started the fight during recess. Or a jury who must decide a similar question, including the reasonableness of force and self-defense.⁹⁹

"A large and compelling body of social science research—including case studies, studies of conviction rates, death penalty statistics, laboratory findings in mock jury studies, and general research on racial prejudice—

⁹⁴ B.L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks*, 34 J. PERSONALITY & SOC. PSYCHOL. 590, 590 (1976).

⁹⁵ Armour, *supra* note 83, at 787.

⁹⁶ Violent crimes are offenses of murder and non-negligent manslaughter, rape, robbery, and aggravated assault. FBI, *2016 Crime in the United States*, <https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/topic-pages/tables/table-21> (last visited Apr. 6, 2019).

⁹⁷ Property crimes are offenses of burglary, larceny-theft, motor vehicle theft, and arson. *Id.*

⁹⁸ ROBERT M. ENTMAN & ANDREW ROJECKI, *THE BLACK IMAGE IN THE WHITE MIND: MEDIA AND RACE IN AMERICA* 79 (2000).

⁹⁹ OPPORTUNITY AGENDA, *supra* note 84, at 31 (citations omitted); *see also* Franklin D. Gilliam, Jr. & Shanto Iyengar, *Prime Suspects: The Influence of Local Television News on the Viewing Public*, 44 AM. J. POL. SCI. 560, 560 (2000) (finding that exposure to images of black, male, criminal defendants increased whites' punitive attitudes toward crime, as opposed to supporting preventative policies); Joe Soss et al., *Why Do White Americans Support the Death Penalty?*, 65 J. POL. 397, 409 (2003) (finding that, in the presence of large populations of black persons, whites' racial antagonism is particularly associated with high support of the death penalty).

establishes that racial bias affects jury deliberations.”¹⁰⁰ The manner in which racial stereotypes infects the reasonableness determination is simple to understand: if the victim belongs to a racial group whose members are perceived as dangerous, violent, or criminal, jurors may perceive the victim’s ambiguous actions as more dangerous, violent, or criminal than they actually are.¹⁰¹ In fact, one study “determined that race was the most significant factor that determined whether a self-defense incident would be labeled as justified.”¹⁰² Even more alarming, “[a] larger national study found that in cases where whites killed blacks, the killing was 281 percent more likely to be labeled as justified.”¹⁰³

In an attempt to reduce bias in cases at which race is a core issue or avoid overly sensationalized case themes that appeal to the public eye, courts often ban references to race during trial. However well-intentioned such an instruction may be, it proves more harmful than not. Rather than pretending race did not play a role in the confrontation, jurors should be consistently reminded that Defendant X is white, and Victim was black because those facts alone may reveal some truth about Defendant X’s fear and use of deadly force. More importantly, trials which apply a color-blind approach bring to light deep-seated racial prejudice among those jurors that are low in *explicit* racism but high in *implicit* racism.¹⁰⁴ If race is made prominent in the courtroom, white jurors will typically suppress their negative biases in an attempt to appear egalitarian, politically correct, and above all the bias that pervades the rest of society.¹⁰⁵ Conversely, if race plays only an implicit role in the courtroom, but is still the elephant in the courtroom, white jurors’ implicit biases will feel free to infect their decision-making.¹⁰⁶ In the context of trials in which the jurors are white and the defendant is black, Professors Samuel R. Sommers and Phoebe C. Ellsworth describe the harm that stems from the relationship between color-blind trials and subconscious bias:

Today, [] many Whites embrace an egalitarian value system and a desire to appear nonprejudiced. As a result, salient racial issues in a trial are likely to remind White jurors that they should avoid prejudice, and these jurors will adjust their

¹⁰⁰ Armour, *supra* note 83, at 795.

¹⁰¹ Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 423 (1996).

¹⁰² ABA REPORT AND RECOMMENDATIONS, *supra* note 3, at 2 n.4.

¹⁰³ *Id.*

¹⁰⁴ Elizabeth Ingriselli, *Mitigating Jurors’ Racial Biases: The Effects of Content and Timing of Jury Instructions*, 124 YALE L.J. 1690, 1695–96 (2014).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 1696 (“It is by now clear that conscious and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trials, perhaps determining the verdict of guilt or innocence.”); *Georgia v. McCollum*, 505 U.S. 42, 68 (1992) (O’Connor, J., concurring).

judgment of Black defendants accordingly. But, when race is not salient in a trial, contemporary norms of egalitarianism are not necessarily triggered. In these cases, Whites will be more likely to render judgment tainted by the racial stereotypes and prejudice that linger in the consciousness of even the least overtly prejudiced of individuals.¹⁰⁷

Whether or not white jurors truly are as fair and impartial as they make themselves out to be, removing race from the conversation during trial—the State’s case-in-chief, the defendants’, and the State’s rebuttal—is not the proper approach to battling the subconscious bias that so severely impairs jurors’ judgment.¹⁰⁸

*B. The Failure of the Color-Blind Approach*¹⁰⁹

Consider in this regard two of the most controversial self-defense cases in recent American history: *People v. Goetz* and *State v. Zimmerman*. Both trials involved the shooting of black teenagers. Both trials resulted in acquittals. Neither trial mentioned race.

On a New York City subway train in 1984, Bernhard Goetz shot and wounded Barry Allen, Troy Canty, Darrell Cabey, James Ramseur—four black teenagers—after they approached him and asked for five dollars.¹¹⁰ At his trial, Goetz, later dubbed the “Subway Vigilante,” claimed that a reasonable person under the circumstances would have believed that deadly force was necessary to prevent the threat of imminent death or serious bodily injury that the teenagers posed, given his prior experience as a mugging

¹⁰⁷ Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL’Y & L. 201, 203 (2001).

¹⁰⁸ Professors Samuel R. Sommers and Phoebe C. Ellsworth suggest that attorneys defending black defendants should “play the race card” in order to avoid the perils of a color-blind trial:

An attorney defending a Black defendant might be wise to intentionally introduce racial issues during a trial’s proceedings, during the examination of witnesses, or during opening or closing statements. An attorney might suggest that a Black defendant’s race influenced the allegedly criminal incident, the subsequent police investigation, the likelihood of arrest, or the indictment decision eventually made by prosecutors. . . . [This tactic] could be an effective way to remind White jurors of their egalitarian values and of the possibility of racial bias in the criminal system.

Sommers & Ellsworth, *supra* note 107, at 223.

¹⁰⁹ Eva Paterson, et al., *The Id, the Ego, and Equal Protection in the 21st Century: Building upon Charles Lawrence’s Vision to Mount a Contemporary Challenge to the Intent Doctrine*, 40 CONN. L. REV. 1175, 1175 (2008) (“Our politicians and courts laud the progress we have made towards becoming a ‘color-blind’ society, but in reality, they too often mistake ‘race-blindness’ with ‘racism blindness.’”).

¹¹⁰ This shooting resulted in recovery for three of the four teenagers, but Darrell Cabey was rendered a paraplegic with brain damage and later filed a civil suit against Goetz for \$50 million in damages. *People v. Goetz*, 497 N.E.2d 41, 43 (N.Y. 1986); see Jan Hoffman, *Goetz II: Race Card, Early and Often*, N.Y. TIMES (Apr. 11, 1996), <https://www.nytimes.com/1996/04/11/nyregion/goetz-ii-race-card-early-and-often.html>.

victim.¹¹¹ Race did not play a role in Goetz's argument or in the court's opinion—instead, the case is now a regular addition to first-year criminal law casebooks for the proposition that a defendant's prior experiences as a mugging victim should inform the jury's reasonableness determination.

Race was conspicuously absent from the trial, as well. Despite the issue of race never appearing on paper, during opening statements, or throughout cases-in-chief, legal theorists have identified several unquestionable instances in which the defense made subliminal appeals to the underlying racial aspect of the case.¹¹² The most undeniable illustration of tugging at jurors' subconscious bias about black males was when the defense recreated the shooting of the teenagers by calling in four young black Guardian Angels to act as the four black victims.¹¹³ Professor George Fletcher, who witnessed the entire trial, also noted the effects of consistently referring to the four victims as "savages," "vultures," "the predators' on society," and "the 'gang of four'":

These verbal attacks signaled a perception of the four youths as representing something more than four individuals committing an act of aggression against a defendant. That "something more" requires extrapolation from their characteristics to the class of individuals for which they stand. There is no doubt that one of the characteristics that figures into this implicit extrapolation is their blackness.¹¹⁴

James Ramseur, himself, questioned the defense's tactics when Goetz's lead counsel repeatedly highlighted Ramseur's criminal record in an attempt to "portray him as a thug."¹¹⁵ Clearly recognizing the defense's surreptitious use of anti-Black bias and "[a]ngered by the questions about his record, Mr. Ramseur at one point snapped, 'Has that got anything to do with him shooting me?'"¹¹⁶ In stark distinction to the color-blind criminal trial,¹¹⁷ Darrell Cabey overtly and expertly 'played the race card' in his civil suit against Goetz,

¹¹¹ *Goetz*, 497 N.E.2d at 52.

¹¹² See Armour, *supra* note 83, at 783 (citing GEORGE P. FLETCHER, A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL 206–08 (1988)); see also Cynthia Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 422 (1996) (describing the same scene).

¹¹³ Armour, *supra* note 83, at 784.

¹¹⁴ *Id.* (quoting FLETCHER, *supra* note 112, at 206).

¹¹⁵ Mary Connelly & Carlyle C. Douglas, *In Goetz Trial, the Defense Goes on Offense*, N.Y. TIMES (May 24, 1987), <https://www.nytimes.com/1987/05/24/weekinreview/the-region-in-goetz-trial-the-defense-goes-on-offense.html?searchResultPosition=35>.

¹¹⁶ *Id.*

¹¹⁷ In his opening statement, Darrell Cabey's attorney quoted Goetz as saying: "The only way you're going to clean up these streets is to get rid of spics and niggers." Adam Nossiter, *Race Is Dominant Theme As 2d Goetz Trial Begins*, N.Y. TIMES (Apr. 12, 1996), <https://www.nytimes.com/1996/04/12/nyregion/race-is-dominant-theme-as-2d-goetz-trial-begins.html>.

resulting in a \$43 million verdict.¹¹⁸ “Reacting testily to a question about whether he was playing what has come to be called ‘the race card,’ [Darrell Cabey’s attorney] said: ‘The race card in this case was played by Bernhard Goetz. He played on the fears of the jury.’”¹¹⁹

Despite the wide commentary outside the courtroom about Goetz’s race, that of the four victims and the obvious racial qualities of the crime, Goetz’s trial failed to address that aspect in any meaningfully outright manner.¹²⁰ Goetz was eventually sentenced to six months in jail for carrying an unlicensed concealed pistol and acquitted of charges of attempted murder and assault.¹²¹

With some eerie similarity,¹²² George Zimmerman fatally shot Trayvon Martin, an unarmed black teenager, in a Central Florida neighborhood in 2012.¹²³ In *State v. Zimmerman*, like in *People v. Goetz*, race did not play the role that the world outside the courtroom thought it should have.¹²⁴ In fact, the trial judge expressly limited the prosecutors in a pivotal way:

Prosecutors . . . could argue that Zimmerman “*profiled*” Trayvon Martin as a likely intruder because the self-appointed neighborhood watchman did not recognize the

¹¹⁸ See John J. Goldman, *Jury Orders Goetz to Pay \$43 Million for Shooting*, L.A. TIMES (Apr. 24, 1996), <https://www.latimes.com/archives/la-xpm-1996-04-24-mn-62154-story.html>.

¹¹⁹ Nossiter, *supra* note 117.

¹²⁰ See also Floyd H. Flake, *Blacks Are Fair Game*, N.Y. TIMES (June 19, 1987), <https://www.nytimes.com/1987/06/19/opinion/blacks-are-fair-game.html> (“I believe that the Goetz decision sends the wrong signals to white Americans. It says blacks are fair game. If a white person suspects, rightly or wrongly, that a black man may commit a criminal act, then a white person is able to take any action he sees fit.”).

¹²¹ *Goetz Given 6-Month Term on Gun Charge*, N.Y. TIMES (Oct. 20, 1987), <https://www.nytimes.com/1987/10/20/nyregion/goetz-given-6-month-term-on-gun-charge.html>.

¹²² In his opening statement, the prosecutor directly quoted George Zimmerman on his phone call to a 911 dispatcher just moments before he shot Trayvon Martin: “Fucking punks. These assholes. They always get away.” Croaker Queen, *George Zimmerman Trial – Day 1 – Part 1 (Opening Statement)*, YOUTUBE (June 24, 2013), <https://www.youtube.com/watch?v=qsgtFBN8uKs>; see Lizette Alvarez, *Zimmerman Case Has Race as a Backdrop, but You Won’t Hear It in Court*, N.Y. TIMES (July 7, 2013), <https://www.nytimes.com/2013/07/08/us/zimmerman-case-has-race-as-a-backdrop-but-you-wont-hear-it-in-court.html>; Steven Mazie, *The Quiet Racism in the Zimmerman Trial*, BIG THINK (July 16, 2013), <https://bigthink.com/praxis/the-quiet-racism-in-the-zimmerman-trial>.

¹²³ See Lizette Alvarez & Cara Buckley, *Zimmerman Is Acquitted in Killing of Trayvon Martin*, N.Y. TIMES (July 14, 2013), <https://www.nytimes.com/2013/07/15/us/george-zimmerman-verdict-trayvon-martin.html>.

¹²⁴ See Alvarez, *supra* note 122 (“From the very beginning, there was no more powerful theme in the fatal shooting of Trayvon Martin than the issue of race. But in the courtroom . . . race lingers awkwardly on the sidelines, scarcely mentioned but impossible to ignore.”); Mazie, *supra* note 122 (“But since these racial overtones were banned from the courtroom discourse, the jurors had no opportunity to consider them.”).

young man [but they] could not argue that Zimmerman “racially profiled” Martin.¹²⁵

Read that again.

Prosecutors . . . could argue that Zimmerman “profiled” Trayvon Martin as a likely intruder because the self-appointed neighborhood watchman did not recognize the young man [but they] could not argue that Zimmerman “racially profiled” Martin.¹²⁶

Despite race being the elephant in the courtroom, prosecutors were barred from outright stating that race played any role in Zimmerman’s decision to use deadly force.¹²⁷ Not only did the court ignore every protest, speech, and criticism that acknowledged the most obvious nature of the crime, the court forced both parties and all six jurors to do so, as well. Bernhard Goetz, himself, commented, “I’m surprised the same thing is happening 30 years later. It’s a different place, but the prosecution is the same.”¹²⁸ The jury eventually found Zimmerman not guilty of second-degree murder and acquitted him of manslaughter.¹²⁹

Perhaps there did not exist a single juror during either deliberation that considered the race of the defendants or the five black teenagers involved.¹³⁰ Perhaps every juror failed to consider the quite conceivable idea that the defendants truly feared that the teenagers were going to use deadly force against them simply because Trayvon Martin, Barry Allen, Troy Canty, Darrell Cabey, and James Ramseur were black. However, even in the unlikely scenario that race did not play a factor in deciding to acquit Bernhard Goetz and George Zimmerman of all charges, no juror should feel as though the law allows them to take race into consideration when deciding whether a defendant’s fear of the victim was reasonable.¹³¹

¹²⁵ WBUR, *No Race in the Courtroom, No Justice for Trayvon Martin* (July 15, 2013), <https://www.wbur.org/cognoscenti/2013/07/15/george-zimmerman-verdict-eileen-mcnamara> (emphasis added).

¹²⁶ *Id.*

¹²⁷ “There is no question that race is the 800-pound gorilla in this trial[.]” *Id.*

¹²⁸ Harry Siegel & Filipa Ioannou, *Bernhard Goetz on George Zimmerman: ‘The Same Thing Is Happening’*, THE DAILY BEAST (July 12, 2013, 4:45 AM), <https://www.thedailybeast.com/bernhard-goetz-on-george-zimmerman-the-same-thing-is-happening>.

¹²⁹ Alvarez & Buckley, *supra* note 123.

¹³⁰ Any person at the Zimmerman trial would be hard-pressed to advance this argument. “Trayvon Martin’s race, however, could not be completely eliminated from the jury’s consciousness. Jurors needed only to look at the autopsy photos of Trayvon Martin or observe his parents in the courtroom to be aware of his race.” Cynthia Lee, (*E*)*Racing Trayvon Martin*, 12 OHIO ST. J. CRIM. L. 91, 107 (2014).

¹³¹ In 1996, Professor Lee took note of the same critiques made in this comment:

In the Goetz case, the jury instructions, which did not mention race or racial stereotypes, did not reduce the chances that the race of the victims might prejudice the jurors in Goetz’s favor. If the jurors were inclined to perceive the actions of the four Black youths as hostile or violent, at least in

Fact-finding is a difficult task, even when race is not at issue. Fact-finding becomes downright impossible when race is at issue but is swept so far underneath the rug that prosecutors cannot say the word “racial” if it precedes the word “profiling.” Thus, in a society in which our racial prejudices are formed without the involvement of individual conscious energy, courts must determine the extent of the role of race in the courtroom. Courts may either acquiesce to systemic racial prejudice by legitimizing verdicts rendered on the basis of implicit racial biases¹³² or they may apply a hardline rule in which “inevitable bias” has no place.

IV. RECOMMENDATION

The subconscious racial bias exposed in the previously discussed studies reveals the danger in instructing jurors to consider the “physical attributes of all persons involved, including the defendant”¹³³ without explicitly excluding race. Few Americans are likely to acknowledge the racial animus that they embody,¹³⁴ and even fewer are likely to take the precautions needed to operate without it. May the birthplace of racial animus be in overrepresentation in news stories about violent crimes or in real-life interaction with black persons, such animus (a) is typically subconsciously activated and inadvertently present, and (b) does not get left behind outside of the courthouse doors.¹³⁵ Ultimately, when the reasonableness

part because the youths were Black, they were allowed to rely on these stereotype-driven feelings. If the jurors were inclined to empathize more with Goetz than his victims because of racial affinity, the jury instructions did nothing to discourage such racially selective empathy.

Lee, *supra* note 101, at 423.

¹³² Professor Jody D. Armour aptly summarized the effect of condoning such a conclusion on future trials:

[G]ranting legal recognition to [self-defense claims based on a fear of black men] communicates the state’s approval of racial bias regardless of what theory she pursues; it sends the message that “your dread of blacks is a valid excuse for taking the life of an innocent black person.” In conveying such messages, the court reinforces derogatory cultural stereotypes and stigmatizes all Americans of African descent.

Armour, *supra* note 83, at 815.

¹³³ *People v. Goetz*, 68 N.Y.2d 96, 114 (N.Y. 1986); *see also* ZIMMERMAN V. STATE JURY INSTRUCTIONS, *supra* note 82 (“In considering the issue of self-defense, you may take into account the relative physical abilities and capacities of George Zimmerman and Trayvon Martin.”).

¹³⁴ A juror is not likely to admit being a prejudiced person, against African-Americans or Asian-Americans or Hispanics, as the case may be, and indeed might not recognize the extent to which unconscious racial stereotypes might affect his or her evaluation of a defendant of a different race, or of the witnesses produced on that defendant’s behalf.

State v. Tucker, 629 A.2d 1067, 1077–78 (Conn. 1993).

¹³⁵ “The one place where a man ought to get a square deal is a courtroom, be he any color of the rainbow, but people have a way of carrying their resentments right into a jury box.” HARPER LEE, *TO KILL A MOCKINGBIRD* 220 (1960).

determination comes down to the costs of waiting before using deadly force and not waiting to use deadly force, evidence of race becomes a major player.

The justice system, which seeks “both to accommodate the behavior of ordinary persons and to encourage desirable behavior,” should err on the side of “formulating rules that prevent the stigmatization of blacks, reflect the community’s moral aspirations of racial equality, and help eradicate racial discrimination.”¹³⁶ In an effort to do so, courts should begin by instructing jurors that race is not a factor that may be taken into consideration when determining whether a defendant’s fear of the victim was reasonable. Jurors may not conclude that Defendant X, a white male, was reasonable in his belief that Victim, a black male, was going to use deadly force against him because, among other factors, Victim was black.

Florida’s current model jury instructions for the justifiable use of deadly force state: “In considering the issue of self-defense, you may take into account the relative physical abilities and capacities of the defendant and (victim).”¹³⁷ One possible reform of model jury instructions would be to offer a limiting instruction addressing the impropriety of relying on stereotypes. Such an instruction may include the following language:

In considering the issue of self-defense, you may take into account the relative physical abilities and capacities of the defendant and victim. However, you should not make assumptions about the defendant or victim based on their race or ethnicity. Assumptions about a party’s race or ethnicity do *not* have a basis in the evidence before you. Therefore, those assumptions should *not* factor into your determination about whether the defendant’s use of deadly force was reasonable. If you find that your evaluation of the case is affected by a subconscious reliance on stereotypes, you must attempt to reevaluate the case from a neutral perspective.¹³⁸

Other acceptable forms include instructions that stress the importance of not relying on biases,¹³⁹ or more explicit instructions that list all *proper*

¹³⁶ Armour, *supra* note 83, at 815–16.

¹³⁷ FLORIDA STANDARD JURY INSTRUCTIONS 3.6(F): JUSTIFIABLE USE OF DEADLY FORCE, <https://jury.flcourts.org/criminal-jury-instructions-home/criminal-jury-instructions/sji-criminal-chapter-3/>.

¹³⁸ See Lee, *supra* note 101, at 481–83 (proposing a similar supplemental limiting instruction, including language that suggests to jurors to engage in a race-switching exercise in order to determine whether they are making unfair assessments based on racial stereotypes).

¹³⁹ See, e.g., MD. STATE BAR ASS’N, MARYLAND CRIMINAL PATTERN JURY INSTRUCTIONS § 2:04 (2nd ed. 2018); CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA § 2.102 (4th ed. rev. 2008); CALIFORNIA FORMS OF JURY INSTRUCTION § 113 (Matthew Bender and Co. ed. 2019) (1985).

considerations (height, weight, etc.)—while strictly excluding race.¹⁴⁰ Judge Mark W. Bennett of the United States District Court for the Northern District of Iowa goes a step further than most model jury instructions:

Do not decide the case based on “implicit biases.” As we discussed in jury selection, everyone, including me, has feelings, assumptions, perceptions, fears, and stereotypes, that is, “implicit biases,” that we may not be aware of. These hidden thoughts can impact what we see and hear, how we remember what we see and hear, and how we make important decisions. Because you are making very important decisions in this case, I strongly encourage you to evaluate the evidence carefully and to resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common sense, and these instructions. Our system of justice is counting on you to render a fair decision based on the evidence, not on biases.¹⁴¹

Recommendations to mend jury instructions never come without their fair share of criticisms: jurors are hopelessly confused by jury instructions,¹⁴² raising race as an issue right at the end of a trial will only remind jurors that it exists,¹⁴³ and jury instructions about racial prejudice make little, if any, impression on jurors who operate with it subconsciously.¹⁴⁴ As powerfully supported as the criticisms may be, if jury instructions were truly useless, courts would stop using them altogether. The better approach is to deal head on with the elephant in the courtroom rather than pretend it does not exist.

¹⁴⁰ “When assessing the reasonableness of [Defendant]’s fear, you may consider the individual characteristics of [Defendant] and [Victim], such as their respective size, gender, age, physical condition, strength, stamina, courage, and assertiveness.” VT. BAR ASS’N, VERMONT MODEL CRIMINAL JURY INSTRUCTION CR07-111, SELF-DEFENSE (USE OF DEADLY FORCE) (2019), <http://www.vtjuryinstructions.org/criminal/MS07-111.htm>.

¹⁴¹ Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 859 (2012).

¹⁴² See Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739, 1793 (1993) (“Instructions, however, would be unlikely to provide much of a shield against racial imagery, even were judges more inclined to give them. The limited research from mock juries indicates that jurors often do not attend to, or are confused by, jury instructions.”).

¹⁴³ *Id.* (“Even more discouraging is the possibility that judicial references to race may serve to recall and emphasize a racial image presented earlier in the trial[.]”).

¹⁴⁴ *Id.* (“Moreover, jury instructions assume that the influence of racial imagery on deliberations is conscious; even if instructions inhibit jurors from speaking in explicitly racial terms, they are unlikely to be very effective in erasing previously introduced racial imagery.”).

Without a jury instruction that explicitly forbids race from the reasonableness determination, courts are no longer abiding by the “reasonable man” standard; rather, courts are holding defendants to the “reasonable racist”¹⁴⁵ standard. Even if a mountain of empirical sociological evidence reveals that every single person in society is guilty of racial prejudice, such prejudice is improper, and it is even more improper for courts to condone it. To turn a blind eye to racial bias is to turn a blind eye to our aspirations of blind justice. Thus, the court’s duty is to adopt jury instructions which forbid jurors from contemplating a defendant or victim’s race as a factor that plays into the reasonableness determination because to fail to do so would be to actively endorse racial prejudice.

¹⁴⁵ Professor Jody D. Amour explains who the “reasonable racist” is and what his views are:

The Reasonable Racist asserts that, even if his belief that blacks are “prone to violence” stems from pure prejudice, he should be excused for considering the victim’s race before using force because most similarly situated Americans would have done so as well. For inasmuch as the criminal justice system operates on the assumption that “blame is reserved for the (statistically) deviant,” an individual racist in a racist society cannot be condemned for an expression of human frailty as ubiquitous as racism.

Amour, *supra* note 83, at 787. *But see* Lee, *supra* note 101, at 459 (“The problem with The Reasonable Racist’s claim is that a ‘typical’ belief is not necessarily a ‘reasonable’ belief. Just because most or many people share the same bias does not mean that the shared bias is a reasonable bias. The average person is not necessarily reasonable.”).